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Grutter v. Bollinger: This Generation's Brown v. Board of Education?

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ARTICLES

GRUTTER V. BOLLINGER: THIS GENERATION'S *BROWN V. BOARD OF EDUCATION*?

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INTRODUCTION

WHAT does *Brown* mean today? To answer that question, we must address the Court's recent decision in *Grutter v. Bollinger*[1] within the framework of the Court's affirmative action jurisprudence more generally. *Brown*, of course, held that "separate educational facilities are inherently unequal,"[2] that is, that "segregation of [minority] children in public schools," deprives them of "equal educational opportunities."[3] Contained within *Brown* was the promise of integration. The promise was that by eliminating *de jure* segregation, the architecture of white subordination could be made to crumble, and that all Americans, through enhanced intergroup and interpersonal contact, would become more fully equipped to meet the challenges of a complex and ever-changing modern society.

But if we look at the wide sweep of the *Brown* implementation cases we see, instead, a Court that was never able to come to terms with *Brown*'s promise.[4] The reality is that the Supreme Court has simply withdrawn from the continuing and extraordinarily difficult problem of desegregating the public schools on the K-12 level.[5] Today, K-12 school segregation is on the rise,[6] and "desegregation" has become part of a bygone era. Quite simply, the Supreme Court has moved on. So to the extent that *Brown* survives in any real way today, it does so through the force of the idea it championed—which was the importance of racial integration—rather than because it stands for any firm and incontrovertible mandate that secondary schools must be desegregated.

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1. 539 U.S. 306 (2003).

2. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

3. *Id.* at 493.

4. Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future* 47 HOWARD L.J. (forthcoming 2004).

5. Erwin Chemerinsky, *Courts Must Share the Blame for the Failure to Desegregate Public Schools* 30-38, *available at* http://www.civilrightsproject.harvard.edu/research/reseg02/chemerinsky.pdf (Aug. 15, 2002).

6. *See* Erica Frankenberg, Chungmei Lee & Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 4-6, *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (Jan. 16, 2003).

Now consider the Court's recent affirmative action jurisprudence. Prior to *Grutter*, the Court's most recent pronouncements on affirmative action fell into two general categories: cases having to do with the use of racial preferences in meting out an employment benefit or opportunity, and cases dealing with the use of race in structuring electoral districts in the voting rights context.[7] In both of these areas, the Court suggested that racial preferences assisting minority group members were unlikely to pass constitutional muster.[8] Yet in *Grutter*, the Court not only allows racial preferences to be used in a manner that burdened white applicants to the University of Michigan Law School, but does so with some enthusiasm.[9] Thus, a well-informed observer might marvel at the Court's pronouncement in *Grutter* given its abandonment of the demands of K-12 desegregation and its professed "skepticism" with respect to all racial classification schemes, whether benign or invidious.[10]

Given all of this, how does one explain *Grutter*? One answer is that *Grutter* is this generation's *Brown*, presenting a "solution" to the terribly difficult and divisive racial question of our time, but through a method that simultaneously cleaves to high ideal, while recoiling from specificity with respect to enforcement. In this way, *Grutter* mimics *Brown*, following its methodology and accepting the propriety of its overriding theme. In *Grutter*, as in *Brown*, the Court: (1) accepted rather than denied that there was a deeply divisive and enduring social problem at issue; (2) found a way to "solve" that problem through a resort to "high ideals" affecting society as a whole rather than just minority group members; and finally (3) distanced itself from the actual machinations of how diversity would be implemented.[11]

Understanding *Grutter* from this perspective also helps to explain the seeming disconnect between the Court's recent affirmative action jurisprudence and *Grutter*'s outcome. At first blush, *Grutter* appears to be a deviation from the body of the Court's recent affirmative action jurisprudence: it says "yes" where the other cases said "no." But it is not so clear that *Grutter* is a deviation from current law. Instead, it might be seen as consistent with it, in that the justification for the racial preference recognized in *Grutter* transcended the justifications offered in the previous cases, and the method used to achieve that end, "race as a factor," diffused rather than highlighted race. From this perspective, *Grutter* addressed several concerns that had troubled the Court for many years, reorientating the affirmative action problem away from explicitly addressing the harms experienced by minority group members toward a more prospective orientation which asks: what's best for the country moving forward? *Grutter* thus answered the question of how it might be possible to sustain an affirmative action plan once it was clear that strict scrutiny applied. The answer is by reliance on the same underlying rationale that was recognized in *Brown*: the importance of racial integration to American society.

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7. *See infra* part II.
8. *See id.*
9. *Grutter*, 539 U.S. at 336-41.
10. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223-224 (1995).
11. Grutter v. Bollinger, 539 U.S. 306, 339-42 (2003).

Thus, *Grutter* might be understood as this generation's *Brown v. Board of Education* because it managed to reinvigorate the judicial commitment to affirmative action (which is after all the preeminent civil rights policy of our time) by a clear commitment to the same abstract principle that commanded the Court in *Brown*: racial integration. At the same time, the *Grutter* Court used essentially the same analytical process—commitment to high ideal, refrain from detail—that was favored in *Brown*. Both cases, then, are examples of equal protection jurisprudence on the level of high theory. The animating rationale in each is an abiding belief in the importance of race mixing or diversity for society's sake. They are both prospective, rather than retrospective decisions. But, of course, if this is true, the question that remains to be answered, particularly given the *Grutter* Court's twenty-five year "phase out" reference,[12] is whether the same pattern that obtained after *Brown* will be repeated: invocation of high and deeply important principle, judicial inattention, articulation of a more detailed enforcement framework, and then ultimately retreat.

I. *BROWN V. BOARD OF EDUCATION* AND RACIAL INTEGRATION

Brown v. Board of Education, of course, was the culmination of a lengthy and protracted litigation strategy which sought to destroy *de jure* segregation in all phases of American life.[13] The strategy was incremental, and by the time the *Brown* litigation reached the Supreme Court, the Court was finally prepared to deal with a vexing and highly contested issue: the propriety of state-mandated segregation in American public schools.[14] The background and facts of the *Brown* decision are quite well known.[15] The case challenged *de jure* segregation in four states on the theory that "segregated public schools are not 'equal' and cannot be made 'equal,'" and thus were a violation of the Equal Protection Clause of the 14th Amendment.[16] The Court agreed and ruled that "in the field of public education the doctrine of 'separate but equal' has no place."[17]

The significance of *Brown* is difficult to overestimate. However, it is important to remember that in *Brown* the Court was only prepared to go so far. *Brown I* confined itself to the field of public secondary education and did not even reach the question of the appropriate remedy for the harm that it had defined. The larger question of the propriety of *de jure* segregation in other phases of American life would have to wait until a later date. How did the *Brown* Court go about "solving" the incredibly divisive issue of state-mandated segregation in the public schools? It articulated constitutional principle as high ideal, and that ideal was racial integration.

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12. *Id.* at 342.

13. *See generally* RICHARD KLUGER, SIMPLE JUSTICE (1977) (outlining the history of *Brown v. Bd. of Educ.*).

14. MARK C. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 203-04 (1994).

15. *See generally* KLUGER, *supra* note 13.

16. Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954).

17. *Id.* at 495.

Elsewhere I have suggested that *Brown* articulated a visionary notion of integration that was comprised of two major components: the "minority access" perspective and the "diversity" perspective.[18] On the one hand, *Brown* could be seen from a rights-based or rights-granting perspective as providing minority group members with access to white-dominated institutions, such as southern public schools. On this view, *Brown*'s desegregation mandate arises from the understanding that the "only way to undo the myriad harms created by state-imposed segregation is to disestablish the architecture of subordination that defined that system."[19] Thus, *Brown* from the "minority access" perspective stood for the proposition that integration was the appropriate remedy for state-mandated segregation's victims, given the significance of the harm. *Brown* also articulated a second, independent rationale for the desegregation mandate that is of particular import for our discussion here: the "diversity" perspective.[20] In *Brown*, the Court recognized that integration had a significant and independent value outside of the opportunities created for minority group members through the process of desegregation. This was the case because of the intimate relationship among education, democracy, and citizenship.[21]

The *Brown* Court's ruling hinged on the significance of education in American public life, thus the Court's statement that education was perhaps the "most important function of state and local governments."[22] Because education established the foundation of good citizenship, enhanced stable values, and provided the child with a foundation for further professional study in later life, it had to be provided to all on equal terms.[23] Thus, black children could not be deprived of an equal education, because education was so important to the development and later success of the individual as a person and as a member of society.[24]

The opinion also traced the source of the Equal Protection Clause violation to the importance education plays in the lives of *all* Americans.[25] The Court suggested that the importance of the requirement that all children be provided with an equal educational opportunity transcended the specific needs of black children. The Court particularly emphasized the relationship between education and our social and political system.[26] While children lacking access to equal educational opportunities might well be deprived of an important social good, society would also be positively benefited by the presence of children possessing the ability to become good and useful citizens, holding values consistent with those of the larger society: thus leading to the Court's observation that "education is the very foundation of good citizenship," and the Court's emphasis on the relationship between education,

18. Adams, *supra* note 4.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Brown*, 347 U.S. at 493.
23. *Id.*
24. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
25. *See id.*
26. *See id.*

cultural values, and normal adjustment.[27] This, then, was the diversity perspective: American society on the whole benefits when all children have equal access to educational opportunities.

In providing a solution to one of the most vexing social and political issues of that day (or any other), *Brown* spoke in the language of abstract principle, endorsing racial integration as a beneficial aim, but shying away from the thorny realities of its implementation. This, of course, was borne out by the fact that in *Brown I* the Court failed to reach the question of remedy.[28] Similarly, in *Brown II*, which has been amply and justifiably criticized, the Court issued a vague mandate which simultaneously appeased Southern recalcitrance and shifted the burden of implementation of that mandate to the lower federal courts.[29] *Brown II* revealed the Court's disengagement from the realities of implementing *Brown I*'s mandate. The Court's deep-seated ambiguity set the stage for later judicial developments which have resulted in, at best, only a partial fulfillment of *Brown I's* promise.

Combined with *Brown's* mandate that (at least in theory) students of different backgrounds would attend the same schools, *Brown* from the diversity perspective envisioned an American society that the *Grutter* Court inherited almost fifty years later. This vision suggested that American society could be improved through racial integration; that both blacks and whites stood to benefit from enhanced and sustained contact and the "spillover" effects of race-mixing. This vision, however, was articulated in the most abstract and thus most appealing terms: education, democracy, citizenship, and values. It is this vision which *Grutter v. Bollinger* shares.

II. SITUATING *GRUTTER* WITHIN RECENT AFFIRMATIVE ACTION DOCTRINE

In order to understand how *Grutter v. Bollinger* might be seen as this generation's *Brown v. Board of Education*, it is necessary to situate the *Grutter* case within recent affirmative action doctrine. *Grutter* surprised a great many in the civil rights community, along with Court-watchers generally.[30] That surprise was due at the least in part to the fact that *Grutter* differed significantly in both outcome and the language and reasoning used to reach that result from the Court's recent affirmative action decisions.[31] The outcome in *Gratz v. Bollinger*[32] notwithstanding, *Grutter* has delighted as many advocates of affirmative action as it has angered its

27. *Id.*

28. *See id.* at 495.

29. *See, e.g.*, KLUGER, *supra* note 13 (outlining the history of *Brown*).

30. *See, e.g.*, Derrick Bell, *On* Grutter *and* Gratz: *Examining "Diversity in Education,"* 103 COLUM. L. REV. 1622, 1622-23 (2003).

31. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Shaw v. Reno, 509 U.S. 630 (1993); Richmond v. Croson, 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

32. 539 U.S. 244 (2003).

opponents.[33] I suggest that one way to understand *Grutter* is that it solves some of the problems suggested in the earlier affirmative action cases.

One question is why the difference in outcomes in *Grutter* and cases like *Wygant v. Jackson Board of Education*,[34] *Richmond v. Croson*,[35] *Adarand Constructors, Inc. v. Pena*,[36] and *Shaw v. Reno*?[37] If, in fact, all racial classification schemes are "'simply too pernicious to permit any but the most exact connection between justification and classification,'"[38] what is it about the use of race in *Grutter* that allayed the Court's skepticism about racial classifications? And what is it about the use of race in the employment and voting rights contexts that confirmed those suspicions?

One could take a variety of approaches in answering this question. One might probe the use of strict scrutiny in each context and search for differences in the test's application. One might fixate on the different styles and philosophy of each opinion's author (which is very tempting given the fact that Justice O'Connor is the author of the majority opinion in so many of the affirmative action cases). Or one might attempt to situate each opinion in its particular timeframe and ask, were the executive and legislative branches dominated by Democrats or Republicans at the time the opinion was decided? Was the civil rights community better or less well organized at a particular point in time? What role did amicus briefs and other types of organizing play in influencing the Court?

These are all valid and important approaches to answering the question. But I approach the question from another perspective: I ask not just how is voting different from employment, or how is higher education unique, but what larger values are promoted or protected in each context mentioned. I also ask how are those values secured? Does the process used to achieve racial diversity highlight racial differences, or does it seek to downplay and obscure them? Ultimately, I suggest there is a relationship between the answers to these questions and our current understanding of *Brown v. Board of Education*.

A. Intergroup Competition for Jobs and Employment Opportunities

The Court's recent affirmative action jurisprudence in the employment context[39] has taken place in the context of fierce competition between members of racially

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33. *See, e.g.*, Jeremy Berkowitz & Tomislav Ladika, *Supreme Court Upholds Affirmative Action, Rejects Point System*, MICH. DAILY, June 24, 2003, *available at* www.michigandaily.com ("Civil rights leaders and University officials ... express[ed] their delight. .... But recent University graduate James Justin Wilson ... [said] 'This is the worst decision ....'").

34. 476 U.S. 267 (1986) (holding that the school board's use of race for giving preferential treatment in layoffs was unconstitutional).

35. 488 U.S. 469 (1989) (holding percentage of subcontractor contracts based on used of minorities was unconstitutional).

36. 515 U.S. 200 (1995) (holding racial classifications needed to meet strict scrutiny).

37. 509 U.S. 630 (1993) (holding North Carolina's redistricting plan unconstitutional on the basis of racial motivations).

38. *Adarand*, 515 U.S. at 220 (quoting Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

39. I define "employment" broadly to include racial classifications that impact individuals on the job as well as those classifications that might have some impact on the ability to obtain contracts in a competitive bidding environment. Either way, the use of the racial classification alters either an existing or potential employment opportunity.

defined groups for jobs and other employment opportunities. In the context of this competition, the Court has been called upon to determine whether racial preferences could be used to "even the playing field" for new entrants into particular employment markets. *Wygant v. Jackson Board of Education*, *Richmond v. Croson*, and *Adarand Constructors, Inc. v. Pena* demonstrate the Court's refusal to interfere in the employment context and disrupt the "natural" mechanizations of the market, and its propensity to accept rather than deny the ongoing and pervasive nature of racial discrimination in those markets. The employment cases, by their very nature, required the Court to take a position on the influence of the past on the present and to weigh and balance the propriety of racial preferences against that background. Ultimately, the interests put forward by the government to justify the use of racial preferences, which necessarily required recognition of the continuing effect of past discrimination, were simply not significant enough to justify those preferences.

1. Wygant v. Jackson Board of Education

Prior to 1953, no black teachers had been employed in the Jackson public schools.[40] By the early 1970's, the situation had improved somewhat, but the number of black children attending the Jackson public schools far exceeded the number of black teachers.[41] At the same time, Jackson public school teachers were polled with respect to their views on the then existing layoff policy, and the vast majority favored the extant policy, which mandated that teachers be laid off on a straight seniority basis should termination become necessary.[42]

In 1972, contract renegotiations coincided with an outbreak of racial violence in the Jackson school system.[43] That same year, the Jackson Education Association, the Jackson school teachers' collective bargaining unit, ratified a contract that explicitly recognized "the desirability of multi-ethnic representation on the teaching faculty," and sought as a goal that the percentage of minority faculty match that of the student population.[44] Thus, under the newly adopted agreement, white teachers with more seniority could be laid off before minority teachers with fewer years on the job.[45] The theory animating the preference was that minority teachers were instrumental in providing something very important to their students. As the district court below put it, "minority teachers are role models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models."[46]

In *Wygant*, the Supreme Court rejected the district court's ruling upholding the collective bargaining agreement against challenge by laid off white teachers with more seniority.[47] In a plurality decision, Justice Powell ruled that the appropriate

40. Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195, 1197 (E.D. Mich. 1982).
41. *Id.*
42. *Id.*
43. *Id.* at 1198.
44. *Id.*
45. *See id.*
46. *Id.* at 1201.
47. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986).

standard of review was strict scrutiny.[48] "Strict scrutiny," of course, requires the government actor seeking to justify its affirmative action plan to demonstrate that the plan is animated by a "compelling governmental interest" and that that interest is "narrowly tailored" to achieve the government's objective.[49]

Justice Powell ruled that the layoff plan was not supported by a compelling interest: ameliorating the effects of societal discrimination by providing minority "role models" was simply insufficient, and any argument that the layoff plan was an appropriate remedy for the Board's prior discrimination also failed because there was an inadequate evidentiary basis upon which to support that conclusion.[50]

Key to Justice Powell's decision was the narrow tailoring analysis. In *Wygant*, the Court ruled that the layoff plan was not "narrowly tailored" to achieve the interest of remediating past discrimination.[51] In this portion of the decision, Justice Powell emphasized the impact of a layoff scheme on "innocent" parties; white teachers with more seniority were clearly and unambiguously injured under the terms of the collective bargaining agreement.[52] From Justice Powell's perspective, hiring goals were much preferred because they were more "diffuse," spreading the costs of achieving the affirmative action plan's goals "among society generally."[53]

From this perspective, one might see *Wygant* as a case that protected the interests of the laid off white teachers as against those of the more newly hired black faculty. Of course, the interests of those white teachers had presumably been protected by their collective bargaining unit. The problem was as "victims" of the new layoff policy, they now sought to renegotiate the outcome of that bargain. On this view, *Wygant* is a case about competition between racial groups in the employment context where there was a significant prize at issue. Black faculty were new entrants into the competitive market for teachers in the Jackson public schools. They had been kept out of that market for a long period of time because of racial discrimination.[54] The jobs at issue were good union jobs that typically offer job security, health care, some expectation of enhanced salary overtime, some level of prestige, protection with respect to work duties and hours, and some level of work time flexibility (i.e., relatively free summers, perhaps shorter hours).

The upshot of Justice Powell's decision is that the desire to ameliorate societal discrimination by providing effective "role models" for black students in the Jackson public school system was not significant enough to justify clearly and unambiguously harming those who the Court viewed as "innocent victims" of a

48. *Id.* at 273-74.
49. *Id.*
50. *See id.* at 274-79.
51. *Id.* at 283-84.
52. *See id.* at 282.
53. *Id.* at 282-83. As Justice Powell put it, "[l]ayoffs disrupt these settled expectations in a way that general hiring goals do not." *Id.* at 283.
54. The Board, of course, had attempted to argue that it had engaged in employment discrimination in order to justify the layoff plan, but Justice Powell rejected this attempt because there had never been any judicial finding of employment discrimination against the Jackson School Board. *Id.* at 277-78. There was, however, no dispute in the case, that the lack of black teachers before 1953 and the relatively small number of black faculty in the Jackson schools at the time of the adoption of the collective bargaining unit would be attributed to "societal discrimination." *See id.* at 276.

misguided collective bargaining agreement. The desire to ameliorate societal discrimination has at least two problems.

First, allowing societal discrimination to form the basis of a compelling interest that might insulate an affirmative action plan from constitutional attack requires accepting the fact of the ubiquitousness of discrimination and the profound disadvantage and exclusion visited upon blacks until extremely recently. The previous *de jure* discriminatory regime was of such a magnitude, so all-encompassing, as to occasion disbelief from the more modern observant. Instead, the reaction from many well-adjusted, forward-thinking individuals is simply to ignore the sweep of the previous discriminatory system. The problem is just so enormous that the tendency is to deny it. Thus, the acceptance of the societal discrimination compelling interest requires a rejection of the desire to deny.

Second, if the societal discrimination compelling interest requires acceptance of an enormous social problem, the "role model" rationale seems too insignificant to justify so clearly "harming" innocent individuals. In the context of what I suggest was a competitive problem, it seems incongruent to determine the winner of a contest between two groups for societal benefits by suggesting that one group can provide marginally better psychological outcomes to the consumers of the services whom members of either group could adequately serve. To the extent that one views K-12 education as primarily centered on the transfer of knowledge and information (as distinct from the development of the individual outside of knowledge transfer or as having significant spillover effects in other areas), the role model justification simply is not important enough to justify departure from the norm. As I suggest below, I think the *Grutter* Court perceived education differently than the *Wygant* Court.

2. Richmond v. Croson *and* Adarand Constructors, Inc. v. Pena: *Remediating Competitive Disputes Arising from the Present Effects of Past Discriminatory Conduct*

Richmond v. Croson and *Adarand Constructors, Inc. v. Pena* both concerned affirmative action plans that attempted to "even the playing field" for competitive bidding opportunities. In both cases, the governmental actor tried to justify its affirmative action plan as an attempt to remediate the present effects of past discriminatory conduct. I suggest that, as was the case in *Wygant*, there are powerful disincentives militating against recognizing the ongoing effects of prior discrimination. It is useful to view the *Croson/Adarand* line of cases as consistent with *Wygant*, that is, as primarily concerned with mediating intergroup competition.

Richmond v. Croson concerned the city of Richmond's affirmative action program, which set aside 30% of all city contracts for minority business enterprises.[55] Let us take a few steps back and focus on exactly what the Richmond City Council was attempting to achieve with the set-aside program. At the time the set-aside program was created, there were very few minority contractors in

55. Richmond v. Croson, 488 U.S. 469, 477 (1989).

existence eligible to compete for city contracts; the reality was that the construction industry in the surrounding area was completely white-dominated.[56]

The council's rationale for the set-aside was to mitigate the effects of past exclusionary practices on minority contractors.[57] The set-aside program was intended to remedy the present effects of past discriminatory conduct that had resulted in a very small percentage of minority members in area trade associations, a small number of minority business enterprises involved in the construction trade, and a small number of city contracts awarded to minority firms.[58] Thus, the contracting program was an inclusionary mechanism created to disrupt patterns of exclusion in the contracting industry.[59] One way of looking at the set-aside program is as a mechanism intended to "even the playing field" between white and minority contractors. The set-aside thereby enhanced competition overall for city contracts and reduced the benefits enjoyed by white contractors in the Richmond area that had accrued through generations of past discriminatory activities.

Nevertheless, the Court struck the program down.[60] For the Court, the program was problematic for several reasons; I want to focus here on just one. Justice O'Connor, writing for a plurality, was particularly concerned about the fact that a majority of the Richmond city council was black.[61] The assertion was that the Richmond set-aside program was more suspicious because the black "majority" was advantaging itself at the expense of the white "minority," which has been injured by the program.[62] The insinuation was that the set-aside program was simply part of a political spoils system, which canceled out any honest attempt to rectify past wrongs. This assertion also required one to believe that the white dominated construction industry would cease to enjoy influence on the actions of the city council because it was minority dominated.

But what I think is most important to note in thinking about the Richmond city council's predicament, is the role the Court cast itself in. It is important to remember that, at base, the dispute was between two contracting firms, one black and one white, for a city plumbing contract. A lower bidding white contractor challenged the set-aside plan arguing that it violated the Equal Protection Clause.[63] Thus, the question the Court was ultimately forced to answer centered on how to mediate a competitive dispute between two parties for an economic benefit. Indeed, the Court framed the issue in competitive terms, suggesting that "[t]he Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race."[64]

The competitive perspective is important to keep in mind as we analyze how the Court reached its conclusion. *Croson*, of course, rejected the notion that the "sorry history of both private and public discrimination in this country" was relevant

56. *Id.* at 480.
57. *Id.* at 537 (Marshall, J., dissenting).
58. *See id.* at 529 (Marshall, J., dissenting).
59. *See id.* at 543 (Marshall, J., dissenting).
60. *Id.* at 470.
61. *See id.* at 495-96.
62. *Id.*
63. *Id.* at 482-83.
64. *Id.* at 493.

absent a showing of "identified discrimination" on the part of either the governmental entity or private actor that the governmental entity has aided or abetted, for the purposes of justifying an affirmative action plan.[65] But, of course, once the history of past discrimination (and its continuing effects) drops out, the question then becomes: is it appropriate to allow a black dominated city council to help its own? The removal of this history (or one might say denial), left the Court to focus on contractual relationships, bidding requirements, and small business capitalization.[66] The canvas was undeniably smaller, and the Court was no longer deciding large and momentous social issues prospectively. Instead, the issues in the case appeared to be localized, and perhaps even parochial. The Court was no longer adjudicating a historic affirmative action case in the "former capital of the Confederacy,"[67] but was concerned about a parochial "payback" scheme engineered by a local government so possessed of its own power that it even granted preferences to Eskimos and Aleuts.[68]

The same analysis is relevant to the issue in *Adarand*. *Croson* had suggested that because of the unique role accorded to Congress under Section 5 of the 14th Amendment, and the skepticism displayed towards states in Section 1 of the 14th Amendment, perhaps the federal government might be better suited to "identify and redress the effects of society-wide discrimination."[69] Perhaps it was inappropriate for the black-dominated Richmond city council to create a set-aside program, but it might be a different question altogether if the federal legislature, the most representative branch of the federal government, made the same decision.[70] *Adarand* proved that supposition false.

At issue in *Adarand* was a federal program that provided a financial incentive to general contractors working on federal contracts to subcontract part of the dollar amount of the contract to "socially and economically disadvantaged individuals."[71] Under the program, minority group members were presumed to be socially and economically disadvantaged.[72] The Court ruled that all racial preferences whether created by the state or federal government, whether benign or invidious, were to be assessed under the same standard—strict scrutiny.[73] In so doing, *Adarand* essentially incorporated the same level of searching judicial scrutiny that had been applied in *Croson* to affirmative action plans created by the federal government.

As twin contracting cases, much of the analysis with respect to *Croson* is applicable to *Adarand* as well. I would add the following observation to unify the two cases. Both cases turn on the question of whether the government can justify its affirmative action plan on the theory of remediating the present effects of past discriminatory conduct. But, of course, evaluation of such a question requires the Court to accept that such effects continue.

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65. Richmond v. Croson, 488 U.S. 469, 499-500 (1989).
66. *See id.* at 509-11.
67. *Id.* at 528 (Marshall, J., dissenting).
68. *See id.* at 506.
69. *Croson*, 488 U.S. at 490.
70. JOHN HART ELY, DEMOCRACY AND DISTRUST 77-79 (1980).
71. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 200 (1995).
72. *See id.*
73. *Id.* at 227.

One possibility might be that the inequalities we observe between black and whites today are largely caused by the present effects of past discriminatory conduct. This was essentially Justice Marshall's position in *Croson*.[74] Another possibility might be to presume that the inequalities we observe today have little or nothing to do with the continuing effects of past discriminatory conduct, essentially the theory that a significant amount of time has passed since the end of Jim Crow, and there is no longer an unbroken chain of causation between past discrimination and present inequality.[75] Finally, one might also take a position somewhere between these two poles.

But no matter where one falls on the spectrum, it requires the evaluator to take a position on the effects of the past on the present. That is, the "remediating [of] the present effects of past discriminatory conduct" compelling interest requires the judge to evaluate the demands of the equal protection clause from a historical perspective. Such an analysis is inherently uncomfortable. This is the case because by the very nature of the compelling interest itself, the decisionmaker is drawn into an evaluation of conduct, mind-set, and culture that the judge might otherwise prefer to deny.[76] Given this, the ability to arrive at a conclusion in such contentious cases, which speaks prospectively as opposed to retrospectively, is quite attractive.

3. *Affirmative Action in the Voting Context:* Shaw v. Reno

As we saw in the employment context, the Court has ignored the impact of the present effects of past discrimination and has largely refused to permit racial preferences to "even the playing field" between racially defined groups. At the same time, as recent voting rights cases suggest, the Court has also been extraordinarily sensitive to the "message" sent by governmental race conscious actions.

At issue in *Shaw v. Reno* was the constitutionality of two "majority-minority" congressional districts. North Carolina had drawn the first district after the 1990 census, which entitled it to an additional seat in the U.S. House of Representatives.[77] Because North Carolina is a "covered jurisdiction" under Section Five of the Voting Rights Act,[78] all electoral changes had to be submitted to the U.S. Attorney General for approval.[79] The Attorney General objected to the

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74. *See* Richmond v. Croson, 488 U.S. 469, 528 (1989) (Marshall, J., dissenting).

75. *See generally* Michelle Adams, *Causation and Responsibility in Tort and Affirmative Action*, 79 TEX. L. REV. 643 (2000) (discussing the burden some federal courts have placed on defendants in defending their affirmative action plans to show causation between defendants past discriminatory conduct and the present effects of that past conduct).

76. Indeed, only Justice Ginsburg has shown the propensity to regularly engage in historical analysis in the context of affirmative action and school desegregation determinations. *See* Gratz v. Bollinger, 539 U.S. 244, 299-301 (2003) (Ginsburg, J., dissenting); Grutter v. Bollinger, 539 U.S. 306, 342-43 (2003) (Ginsburg, J., concurring); Missouri v. Jenkins, 515 U.S. 70, 175 (1995) (Ginsburg, J., dissenting).

77. Shaw v. Reno, 509 U.S. 630, 633 (1993).

78. *Id.* at 634.

79. *Id.* Section 5 of the Voting Rights Act also allows covered jurisdictions to seek preclearance from a three judge panel of the United States District Court for the District of Columbia. 42 U.S.C. § 1973c (2000).

state's original plan, and the state passed new legislation to add an additional majority-minority district.[80] Both districts became the subject of the litigation which culminated in the *Shaw* case.

The districts were challenged on the theory that their "dramatically irregular shape" constituted an unconstitutional racial gerrymander.[81] The scope of the challenge was unusual. Instead of presenting a more typical vote dilution claim, plaintiffs argued that the redistricting scheme violated their right to participate in a "colorblind" electoral process.[82] Consequently, there was no argument in the case that white voters in North Carolina had experienced any diminution in their overall voting power. Justice O'Connor, writing for the majority, ruled that the two districts were so bizarrely shaped as to violate the Equal Protection Clause of the 14th Amendment.[83] The districts' irregularity sent the unmistakable message that they were drawn "as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."[84]

What was the nature of the harm identified by Justice O'Connor? It was not loss of political power. Instead the harm has been characterized as expressive in nature.[85] The problem was that the state was expressing an idea through its redistricting scheme that the Court said was an anathema to the 14th Amendment. That idea was "political apartheid."[86] The state sent the impermissible and inappropriate message by creating two bizarrely shaped majority-minority districts that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."[87] This message, which the Court said was grounded in "impermissible racial stereotypes," also presented a potentially even greater harm,[88] which is that such districts with their message of solid boundaries between racial groups, carried the risk of forever balkanizing us into "competing racial factions" that "carry us further from the goal of a political system in which race no longer matters."[89]

From this perspective, one might see the two bizarrely shaped districts in *Shaw* as threats to "colorblindness," which the Court has now said is a constitutional imperative.[90] *Shaw* suggests that the society we are working toward should be one where race truly does not matter, such that the government should never take race into consideration in decisionmaking. As I discuss below, one might understand the harm in *Shaw*, sending the message that our society is composed of "competing

80. *Shaw*, 509 U.S. at 635.
81. *Id.* at 633-34.
82. *Id.* at 641-42.
83. *Id.* at 644.
84. *Id.* at 642.
85. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 485 (1993).
86. *Shaw*, 509 U.S. at 647.
87. Shaw v. Reno, 509 U.S. 630, 647 (1993).
88. *Id.*
89. *Id.* at 657.
90. *See id.* at 648-49.

racial factions," as a threat to at least one conception of integration that was recognized as a positive social good in *Grutter*.

Subsequent doctrinal development suggests that the Court has "taken its foot off the accelerator" to some extent in the voting rights cases. For instance, in *Miller v. Johnson*,[91] the Court further clarified the standard from *Shaw*. As it turned out, "bizarreness" was not necessarily the touchstone; the real question was whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[92] After *Miller*, the key seemed to be whether race was a predominant and overriding factor, rather than merely a consideration in the redistricting process.[93] In evaluating race-conscious districting, the Court would ask: has the legislature subordinated traditional districting principles to race?[94] As has been noted, this kind of evaluation maps onto the question of whether a university has used "race as a plus factor" in admissions determinations.[95]

Finally, even more recent voting rights cases suggest that legislatures can take race into account where race is used instrumentally to achieve other, legitimate governmental aims. For instance, in *Easley v. Cromartie*,[96] the Court ruled that legislatures could use race as a factor in districting where their motivation was predominantly political as opposed to racial.[97] Thus, "caution is especially appropriate ... where the state has articulated a legitimate political explanation for its decision, and the voting population is one in which race and political affiliation are highly correlated."[98] Where it can be shown that black voters consistently vote for Democrats, it would be appropriate for the legislature to construct heavily black districts in order to protect incumbents or to achieve other legitimate political objectives.[99]

III. *GRUTTER V. BOLLINGER*: THIS GENERATION'S *BROWN V. BOARD OF EDUCATION*?

The Court in *Grutter v. Bollinger* reaches a different conclusion with respect to the propriety of the affirmative action plan challenged than those I have described above. As I explain, *Grutter* is different than those cases because the Court is able to solve the problem as it defines it, without having to acknowledge some of the more contested issues that were at the core of the previous cases. Thus, *Grutter* is different than the previous affirmative action cases in the employment and voting rights contexts because both race and the continuing effects of discriminatory conduct are subordinated and other more general principles are privileged. This is

91. 515 U.S. 900 (1995).
92. *Id.* at 916.
93. *See id.*
94. *See id.*
95. Pamela S. Karlan, *Easing The Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1598 (2002).
96. 532 U.S. 234 (2001).
97. *Id.* at 239 (citing Hunt v. Cromartie, 526 U.S. 541 (1999)).
98. *Id.* at 242.
99. *See id.* at 239.

consistent with the approach taken in *Brown*. In this way, *Grutter* mimics *Brown*: both cases seek to solve the extraordinarily difficult racial problem of their era by articulating the need for integration at a high level of generality, such that many (but certainly not all) Americans will find it difficult to disagree with the Court's premise.

At issue in *Grutter* was the University of Michigan Law School's admissions policy which used race as a "plus" factor in determining who would be admitted to the class.[100] The law school's goal was to attain a "critical mass of underrepresented minority students."[101] Justice O'Connor, writing for the majority, ruled that the law school's admissions policy, which emphasized a "highly individualized, holistic review of each applicant's file," did not violate Equal Protection, notwithstanding the fact that race was likely "outcome determinative" in many cases.[102]

For our purposes, I focus on two aspects of the majority decision that are particularly pertinent to our discussion of what *Brown* means today. First, it is important to describe the nature of the "compelling interest," which the Court recognized as sufficient to justify the law school's affirmative action plan. The compelling interest recognized in *Grutter*, that of "student body diversity" in the context of higher education,[103] was deeply instrumental. The justification for the plan was its importance in structuring intergroup relationships prospectively, rather than addressing harms that had occurred in the past.[104]

In *Grutter*, the problem, as the Court saw it, was the exclusion of many minority group members from participation in selective educational institutions in the absence of affirmative action. This was borne out by the Court's decision to defer to the law school's educational judgment with respect to its admissions process,[105] and its recognition of the link between access to educational opportunity and the development of a leadership class with "legitimacy in the eyes of the citizenry."[106] But it is very important to understand that in upholding the law school's admission plan, the Court did *not* do so on the basis of any present or past discriminatory conduct. *Grutter*, after all, centered on the legitimacy of the "diversity" interest rather than any argument that the affirmative action plan could be justified as a remedy for the present effects of past discriminatory conduct.[107] I suggest that the University of Michigan's affirmative action plan was upheld precisely *because* it benefited interests outside those of minority group members.

Contrast this with the Court's approach in the employment cases. *Wygant*, *Croson*, and *Adarand* all presented the Court with thorny intergroup competition problems. The underlying problem in those cases was overt and undeniable:

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100. Grutter v. Bollinger, 539 U.S. 306, 336-40 (2003).
101. *Id.* at 325.
102. *Id.* at 338-39.
103. *Id.* at 332-33.
104. *See id.*
105. *Id.* at 332.
106. *Id.* at 335. The law school's expert, Dr. Raudenbush, testified that "a race-blind admissions system would have a 'very dramatic' negative effect on underrepresented minority admissions." *Id.* at 327.
107. *See id.* at 332-35.

members of particular ethnic groups were competing for access to employment opportunities. While it is true that *Grutter* also presents a competition problem (members of a variety of minority groups were "competing" against each other for entrance into the law school), there was no higher, more "objective" general principle that could be referred to in the employment context to mediate the conflict between groups. In the earlier employment cases, the general principle that was said to justify the use of racial classifications was remediating the present effects of past discriminatory conduct.[108] But the problem with that general principle is that it forces the decisionmaker to recognize the extent and nature of racism in American society and, once that reality has been recognized, to openly "take a side" in a social and economic contest.

In *Grutter*, the deeply divisive and enduring social problem was the lack of sufficient racial diversity in selective educational institutions in the absence of affirmative action, which has large spillover ramifications. From this perspective, the law school's affirmative action plan was not an attempt to address racial inequality, but rather functioned to address the disconnect between white domination in the corporate, military, and governmental spheres, and the demands of an increasingly multicultural society. The law school's interest was sufficiently compelling because a racially diverse class leads to diversity in other areas of American society, which ultimately inures to the benefit of everyone.[109] The Court also recognized that contact among members of different racial groups promotes "cross-racial understanding" and "helps to break down racial stereotypes."[110] Thus, the compelling interest recognized in *Grutter* was the importance of racial integration broadly defined.

The second aspect of the Court's ruling that deserves mention is the selection process it favored in seeking to achieve that compelling governmental interest. In *Gratz v. Bollinger*,[111] the Court struck down the admissions process used by the University of Michigan to select undergraduates.[112] The problem with the undergraduate admissions plan was that it awarded "mechanical, predetermined diversity 'bonuses' based on race or ethnicity."[113] In contrast, the law school emphasized individualistic review, flexibility, and competition among all applicants for admission to the class.[114] Thus, the process by which the law school chose its class was consistent with the underlying goal, which was integration defined broadly. At the same time, the process deemphasized overt, mechanical uses of race, and favored covert, more subtle uses of racial classifications.

Contrast the law school's process for selecting applicants to the use of race in the recent voting rights cases. In *Shaw*, the two districts' "dramatically irregular shape" sent an overt signal that race was being privileged.[115] That message, from Justice O'Connor's perspective, was particularly harmful because it had the propensity to

108. *See infra* part II(1)-(2).
109. *See id.* at 333-35.
110. Grutter v. Bollinger, 539 U.S. 306, 333 (2003).
111. 539 U.S. 244 (2003).
112. *Id.* at 269.
113. *Grutter*, 539 U.S. at 338.
114. *See id.* at 337-38.
115. Shaw v. Reno, 509 U.S. 630, 647 (1993).

lead to "political apartheid" and Balkanization.[116] Such messages were inconsistent with a unitary vision of American society. Note, too, *Miller v. Johnson*, which suggests that the underlying problem is really the government actor's use of race in a way in which it predominates over other relevant factors.[117] The use of race in *Grutter*, on the other hand, resolves the tension suggested in *Shaw* and *Miller*. Race is used "appropriately" in *Grutter*, meaning in a way that does not predominate over other relevant factors in the admissions process.

I was sitting on a panel recently, and one of my co-panelists suggested that *Grutter* was perhaps a more important decision than *Brown*. I think that perhaps my co-panelist's assessment was something of an overstatement, but I would suggest a refinement to that statement: that *Grutter* is our generation's *Brown*. Thus, I do think it is worth pondering the relationship between the two cases. If the *Brown* implementation cases are any guide, there is little reason to expect that the Court's commitment to affirmative action on the higher education level will be durable. From this perspective, the twenty-five year "phase-out" should be understood as the time period during which affirmative action's proponents can reasonably expect to hold the Court's attention. After that time period has lapsed, one can assume that the Court will do as it did in *Milliken v. Bradley*[118] (which was decided approximately twenty-five years after *Brown*) and shift its attention *permanently* to those it believes have been made to pay too high a price in the name of diversity.

116. *Id.*
117. Miller v. Johnson, 515 U.S. 900, 920 (1995).
118. 418 U.S. 717 (1974).